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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/032,781	12/28/2001	Gerald B. Cotten	KFHI-101	7182

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EXAMINER	
BECKER, DREW E	

ART UNIT	PAPER NUMBER
1761	

DATE MAILED: 05/03/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

AS

Office Action Summary	Application No.	Applicant(s)	
	10/032,781	COTTEN ET AL.	
	Examiner	Art Unit	
	Drew E Becker	1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE *3* MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *29 March 2004*.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-37* is/are pending in the application.

4a) Of the above claim(s) *27-36* is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-26 and 37* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____ .
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: _____.

DETAILED ACTION

Election/Restrictions

1. Applicant's election with traverse of group I in the telephone interview of January 26, 2004 is acknowledged. The traversal is on the ground(s) that the apparatus of group II cannot be used in any other method except that of group I. This is not found persuasive because the apparatus of group II could be used to heat many types of materials not limited to just those found in group I, for instance non-dairy or non-sugary materials can be heated. Phrases such as "for dissolving sugars" and "for receiving a dairy component" are merely preferred methods of using the claimed apparatus.

The requirement is still deemed proper and is therefore made FINAL.

2. This application contains claims 27-36 drawn to an invention nonelected with traverse in the telephonic interview of January 26, 2004. A complete reply to the final rejection must include cancelation of nonelected claims or other appropriate action (37 CFR 1.144) See MPEP § 821.01.

Claim Rejections - 35 USC § 112

3. The following is a quotation of the first paragraph of 35 U.S.C. 112:

> The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

4. Claim 14 is rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the enablement requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to enable one skilled in the art to which it

pertains, or with which it is most nearly connected, to make and/or use the invention. Claim 14 recites "said dairy component comprises… cocoa". It is not clear how cocoa can be considered a dairy product. Applicant's specification recites on page 23: "Cocoa is defined as a mixture of milk or milk solids and cocoa". It is not clear how "cocoa" can be used to define itself. It is not clear whether "cocoa" (the mixture) or "cocoa" (the component) is being claimed.

Claim Rejections - 35 USC § 103

5. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

6. Claims 1-7, 9-12, 14-26, and 37 are rejected under 35 U.S.C. 103(a) as being unpatentable over Alikonis [Candy Technology] in view of Jackson [Sugar Confectionery Manufacture].

Alikonis teaches a method of making chewy candy by boiling an aqueous sugar composition, admixing a protein-containing dairy component, heating and cooking the mixture, inherently increasing the solids content by boiling off moisture, cooling the mixture, the use of 3-30% dairy, the dairy component including butterfat and evaporated milk, pulling, the aqueous sugar comprising sucrose and corn syrup (page 149), the use of butter (page 152), heating at 235°F (page 152), cooking at 237°F (page 152), and the heating inherently occurring at ambient, or atmospheric, pressure. Alikonis does not

teach the use of plate heat exchangers for the heating steps, and the use of gelatin. Jackson teaches the use of plate heat exchangers (page 180) and the use of gelatin (page 175) in confection making. It would have been obvious to one of ordinary skill in the art to incorporate the plate heat exchangers and gelatin of Jackson into the method of Alikonis since both are directed to methods of making candies, since Alikonis already included heating and cooking (column 1, lines 28-50), since gelatin was a common component in candies as shown by Jackson (page 175), since continuous production via the plate heat exchangers of Jackson would have provided greater output with less mixing and stirring effort, and since the plate heat exchanger of Jackson possessed advantages such as being more compact, having no moving parts, and easy addition and removal of plates to accommodate different heating conditions and volumes (page 180). It would have been obvious to one of ordinary skill in the art to use milk at 30-60°F in the method of Alikonis since Alikonis already included the use of butter (page 152) and since butter was commonly stored at refrigerated temperatures such as these.

7. Claims 8 and 13 are rejected under 35 U.S.C. 103(a) as being unpatentable over Alikonis, in view of Jackson, as applied above, in view of Kolar [Pat. No. 3,677,771]. Alikonis and Jackson teach the above mentioned concepts. Alikonis and Jackson do not teach vacuum flashing and a protein content of 0.4-5%. Kolar teaches a method of making caramels by vacuum flashing (column 8, line 1) and a protein content of 3-37% (column 3, line 34). It would have been obvious to one of ordinary skill in the art to incorporate the vacuum flashing and protein content of Kolar into the method of Alikonis since both are directed to methods of making candies, since Alikonis already included

flashing, powdered milk, and simply did not mention the protein amount, since the vacuum flashing of Kolar would have provided quicker drying, and since caramels commonly possessed 3-37% protein as shown by Kolar.

Response to Arguments

8. Applicant's arguments filed March 29, 2004 have been fully considered but they are not persuasive.

Regarding the 112(1) rejection of claim 14, applicant argues that "cocoa" may properly refer to both a powder and a beverage. However, it is not clear which is being currently being claimed.

Applicant argues that Alikonis does not teach "heating above the initial boiling point..., cooking the dairy-based mass". However, Alikonis clearly teaches boiling a candy mass until it is cooked to a firm ball (page 149).

In response to applicant's arguments against the references individually (ie. Jackson not reciting dairy components and two heat exchangers), one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). In this case, the primary reference of Alikonis teaches a two-step heating process for dairy-based confections. It would have been obvious to one of ordinary skill in the art to incorporate the plate heat exchangers and gelatin of Jackson into the method of Alikonis since both are directed to methods of making candies, since Alikonis already included heating and

cooking (column 1, lines 28-50), since gelatin was a common component in candies as shown by Jackson (page 175), since continuous production via the plate heat exchangers of Jackson would have provided greater output with less mixing and stirring effort, and since the plate heat exchanger of Jackson possessed advantages such as being more compact, having no moving parts, and easy addition and removal of plates to accommodate different heating conditions and volumes (page 180).

Conclusion

9. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

10. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. EP 753715 A2 teaches a plate and frame heat exchanger for candy making.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Drew E Becker whose telephone number is 571-272-1396. The examiner can normally be reached on Mon.-Thur. 8am-5pm and every other Fri. 8am-4pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Drew E Becker
Primary Examiner
Art Unit 1761

4-30-04